WOON KIM CHOY v. ACEXIDE TECHNOLOGY SDN BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZIMAH OMAR JCA
AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NOS: W-01(A)-198-03-2024 & W-01(A)-199-03-2024]
2 DECEMBER 2024

Abstract – *There is nothing incompatible between a person exercising his role as an executive director of the company and, at the same time, having a contract of employment with the company. The two positions and their respective roles and responsibilities may co-exist. It is not uncommon for a director to have a contract of employment with the company, whereby their removal as a director would mean they cease to hold that position but continue in their designated role as a high-ranking senior employee. Whilst he may be removable as an executive director by current or new shareholders, his status as an employee would remain intact unless he is dismissed on misconduct. In such situation, pursuing remedy under a minority oppression action as a shareholder should not prejudice his claim for unlawful dismissal under a contract of employment with the company in the Industrial Court.*

ADMINISTRATIVE LAW: *Judicial review – Appeal – Appeal against decision of High Court – Claimants directors, shareholders and employees of company – Claimants dismissed from employment – Claimants commenced action for minority oppression in High Court and filed complaints in Industrial Court for unlawful dismissal – Industrial Court dismissed claims – High Court affirmed awards of Industrial Court and dismissed judicial review – Whether claimants, as directors of company, also engaged as employees of company – Whether claimants 'workman' with company – Whether contributions to Employees' Provident Fund and Social Security Organisation and filing of deduction of monthly income tax on salaries indicia of contract of employment – Whether reliefs claimed in minority oppression action by claimants as shareholders of company precluded their claims for compensation in lieu of reinstatement for unlawful dismissal as employee/workman – Industrial Relations Act 1967, ss. 2 & 20*

INDUSTRIAL COURT: *Jurisdiction – Award – Claimants directors, shareholders and employees of company – Claimants dismissed from employment – Claimants commenced action for minority oppression in High Court and filed complaints in Industrial Court for unlawful dismissal – Industrial Court dismissed claims on ground that claimants not 'workman' – Whether claimants, as directors of company,*

were also engaged as employees of company – Whether claimants 'workman' with company – Whether reliefs claimed in minority oppression action by claimants as shareholders of company precluded their claims for compensation in lieu of reinstatement for unlawful dismissal as employee/workman – Whether Industrial Court seized with jurisdiction to hear matter – Industrial Relations Act 1967, ss. 2 & 20

WORDS & PHRASES: *'workman' – Claimants dismissed from employment – Claimants directors, shareholders and employees of company – Claimants commenced action for minority oppression in High Court and filed complaints in Industrial Court for unlawful dismissal as employee/workman – Industrial Court dismissed claims on ground that claimants not 'workman' – Whether claimants, as directors of company, also engaged as employees of company – Whether claimants 'workman' – Industrial Relations Act 1967, ss. 2 & 20*

The first respondent, Acexide Technology Sdn Bhd ('company') was incorporated in 1996. The appellants, Woon and Chang, were the promoters of the company, together with one Lim. When the company was incorporated, they each became shareholders and directors of the company. Lim, together with his son ('Jovi'), were the majority shareholders of the company, holding 54% shares while Woon and Chang held 10% and 36% of shares, respectively. Lim had convened an extraordinary general meeting ('EGM') to remove Woon and Chang as the directors of the company. During the EGM, the resolutions to remove the appellants were carried out and, on the same day, the company appointed Jovi as director. The appellants commenced an action for minority oppression against Lim and Jovi in the High Court and each filed a complaint in the Industrial Court, under s. 20 of the Industrial Relations Act 1967 ('Act') for their unlawful dismissal as a 'workman' with the company. The company applied to strike out the appellants' claims in the Industrial Court as it was contended that they were not 'workman' of the company but were instead, directors and hence, the Industrial Court had no jurisdiction to hear the dispute. The Industrial Court dismissed the company's striking out application and proceeded to hear the matter. The Industrial Court found that the appellants did not fall within the definition of a 'workman' under s. 2 of the Act but instead, as directors, they were the 'directing mind and will' of the company. The appellants' claims was dismissed accordingly. The appellants applied for judicial review of their respective Industrial Court awards. The High Court affirmed the awards of the Industrial Court and dismissed the judicial review application. Hence, the present appeal. The issues that arose in this appeal were: (i) whether the appellants, as executive directors of the company, were also engaged as employees of the company and so qualified as a 'workman' under the Act; (ii) whether the fact of contributions to the Employees' Provident Fund ('EPF') and Social Security Organisation ('SOCSO') and the

filing of deduction of monthly income tax on salaries were indicia of a contract of employment; and (iii) whether the reliefs claimed in a minority oppression action by the appellants as shareholders of the company precluded their claim for compensation *in lieu* of reinstatement for unlawful dismissal as an employee/workman.

Held (allowing appeal)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) There was nothing odd in the present case for the directors/shareholders Lim, Woon and Chang, to have themselves treated as an employee of the company with the terms and conditions agreed among them for 23 years and, at the same time, discharging their roles as directors of the company. The fact that there was no written contract of employment did not mean that an oral contract of employment could not subsist between the company and each of them in this case. After all, s. 2 of the Act defines the 'contract of employment' as '… whether oral or in writing and whether express or implied …'. The oral contract of employment was further cemented by the conduct of the company and them. The company, from the inception of its business, had listed Lim, Woon and Chang in the 'register of employees' of the company in its employment record. Throughout the company's accounting documents, references were made to the 'salaries' of the directors rather than 'fees' of directors where the latter would normally be used for those directors who are non-executive and who are not employees of the company. Even in the minutes of the EGM that recorded the appellants were removed, it was made clear that the company would no longer pay 'salaries' to the appellants, underscoring the fact that the company always treated them as its employees. Even though Woon and Chang had carried out their duties as directors of the company under the Companies Act 1965 and the Companies Act 2016, that did not mean that they could not, at the same time, be under a contract of employment under which they also discharged their duties as technical director and project director, respectively, for the company. Thus, they may wear two hats – as directors under the Companies Act and as the most senior and highest-ranking staffs of the company, reporting to the Board of Directors. The degree of control test was rather archaic where professionals and technical staff were concerned, especially when they were very senior and high-ranking in the company. The more senior and responsible a position one occupies as being part of the senior management of the company, the less control one would expect from the company in terms of the day-to-day running of the company. In place of control would be targets to achieve, quality assurances to maintain, risks to manage and strategies to adopt with the focus on the overall performance of the

company. Control and clocking-in are replaced by mutual accountability and accountability to the Board of Directors in its overall objective of growing the company. Therefore, the appellants, as 'workman', were entitled to seek the remedy of reinstatement or compensation *in lieu* of reinstatement as the Industrial Court had the jurisdiction to hear the dispute. (paras 19-21, 31, 33 & 34)

(2) The EPF statements of both Woon and Chang showed that the contributions were based on a percentage of the salaries for the employer (the company) and a percentage of the salaries for the employee. Both the employer and the employee contribute their respective portions to the EPF. It was clear that this arrangement was only applicable in an employer-employee relationship. More than just contributing to the EPF, there was also the contribution to the SOCSO under the Employees' Social Security Act 1969. Additionally, there was a monthly deduction of income tax. It could be seen in the EA Forms submitted to the Lembaga Hasil Dalam Negeri, which included the appellants. These three statutory documents were strong indicia confirming the appellants were employed by the company under a contract of employment as an employee and such a fact had not been rebutted by the company on its flimsy excuse of conferring additional benefits to its directors. (paras 41, 42, 45 & 51)

(3) Any minority shareholder who is aggrieved by the action of the majority would have the *locus* to pursue the remedies available for oppression of a minority shareholder's rights irrespective of whether that shareholder is an employee of the company. The Industrial Court had made an error of law justifying the award to be quashed as the Industrial Court had the jurisdiction to hear the dispute and to grant the compensation sought *in lieu* of reinstatement. There was no show cause letter nor any domestic inquiry held nor any evidence adduced at the Industrial Court to justify their dismissal. Backwages of a maximum of 24 months x their respective salary and allowance were ordered as per the following: (i) for Woon, backwages of RM14,500 per month plus RM4,500 monthly allowance x 24 months = RM456,000; and (ii) for Chang, backwages of RM18,500 per months plus RM6,000 monthly allowance x 24 months = RM588,000. (paras 56, 60 & 71)

Case(s) referred to:

Chong Kim Sang v. Metatrade Sdn Bhd [2004] 2 CLJ 439 CA ***(refd)***

Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection And Testing (M) Sdn Bhd & Anor [2023] 5 CLJ 917 CA ***(refd)***

Inchcape (M) Holdings Bhd v. RB Gray & Anor [1985] 2 CLJ 305; [1985] CLJ (Rep) 132 SC ***(refd)***

Low Thiam Hoe & Anor v. Sri Serdang Sdn Bhd & Ors [2020] 4 CLJ 618 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

A *R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(refd)***
See Teow Koon v. Kian Joo Can Factory Bhd & Ors [2016] CLJU 375; [2016] 1 LNS 375 HC ***(dist)***

B **Legislation referred to:**
Companies Act 2016, s. 206(1)(a)
Employees Provident Fund Act 1991, ss. 2, 42, 43
Employees' Social Security Act 1969, s. 2
Industrial Relations Act 1967, ss. 2, 20
Rules of Court 2012, O. 53 r. 5

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[Editor's note: For the High Court judgment, please see Woon Kim Choy v. Acexide Technology Sdn Bhd & Anor [2024] CLJU 1133 (overruled).]

D *Reported by Lina E*

JUDGMENT

Lee Swee Seng JCA:

E **[1]** The appellants, Woon Kim Choy ("Woon") and Chang Heng Keong ("Chang"), in the two appeals heard together were the promoters of the company, with Mr Lim BH ("Lim"). The company Acexide Technology Sdn Bhd ("the company"), the first respondent in this case was incorporated and commenced business from 15 October 1996. Like most promoters, when the company was incorporated, they each became shareholders as well as
F directors of the company. Lim, together with his son, Jovi, are currently the majority shareholders of the company, holding with 54% shares of the company, whereas Woon has 10% and Chang has 36%.

[2] The company is mainly involved in the field of installation and
G maintenance of fire lighting systems, trenchless technology and transportation. The business grew as the years went by and like all businesses, there were challenges to be confronted. However, Woon and Chang did not expect that Lim would one day, by sheer strength of his majority shareholding, convene an EGM to remove both of them as directors of the company.

H **[3]** The EGM convened on 6 November 2019 to remove Woon and Chang as directors of the company, was a foregone conclusion, as Lim and his son, Jovi, together held a simple majority of the company's shares. As a result, the resolutions to remove Woon and Chang as directors for the
I company were carried. On the same day itself, the company also appointed Jovi Lim as director.

[4] The jurisprudence on the removal of directors by the shareholders at an EGM requisitioned for that purpose is settled. A pertinent case illustrating this is *Low Thiam Hoe & Anor v. Sri Serdang Sdn Bhd & Ors* [2020] 4 CLJ 618; [2020] 10 MLJ 137. In this case, the High Court dismissed the plaintiffs' challenge to the validity of Board meetings and extraordinary general meetings (EGMs) convened to remove them as directors. The court observed that shareholders possess an unfettered discretion to remove directors, emphasising that as long as the removal process adheres to statutory requirements and the company's constitution, judicial intervention is unwarranted.

[5] After the appellants were unceremoniously removed as directors, they commenced an action for minority oppression against Lim and his son. They also, within the time frame provided for in the Industrial Relations Act 1967 ("IRA"), filed a complaint under s. 20 of the IRA with the Director General of Industrial Relations for unlawful dismissal as a "workman" with the company.

Before The Industrial Court

[6] When the Industrial Court first heard the dispute, the company applied to strike out the claim of both Woon and Chang on the grounds that they were not a "workman" of the company but rather that they were directors of the company and hence the Industrial Court has no jurisdiction to hear the dispute.

[7] The Industrial Court dismissed the said application and there was no appeal by the company. The matter then proceeded for hearing in the Industrial Court with the company calling Lim and an employee of the company as witnesses. Woon and Chang gave evidence in the Industrial Court in support of their respective claims for unlawful dismissal.

[8] The Industrial Court found that Woon and Chang did not fall within the definition of a "workman" under s. 2 of the IRA. Instead, as directors, they were considered the 'directing mind and will' of the company. The court emphasised that individuals who are the 'directing mind and will' of a company, such as directors, do not qualify as an employee or a "workman" of the company. The Industrial Court held as follows:

> [76] Having found that the Claimant had failed to prove that he had been a workman or was never a workman, the issue of whether the Claimant was dismissed with just cause or excuse is irrelevant because there was no issue of dismissal of a workman in the first place. It is this court's view that no further deliberation on whether he had been unfairly dismissed without just cause or excuse is required at this point.
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> ...

A [78] For the above reasons, the Claimant was a Director and a shareholder of the company and not an employee. The conduct of all parties at all relevant times shows that the Claimant collectively was the directing mind and brain of the company and worked independently and with no supportive evidence that he was even answerable to the board of directors.

B [79] Accordingly, and on the facts of this case, based on equity and good conscience and the substantial merit of the case without regard to technicality and legal form, the court finds that the Claimant was not a workman of the company within the meaning of "workman" as defined under section 2 of the IRA 1967. As such, the court finds that there was C no dismissal proven by the Claimant in the present case.

[80] The claim by the Claimant is hereby dismissed.

[9] The same finding was made with respect to Chang in another related award. On that ground, the Industrial Court concluded that the appellants D failed to establish that they were "workman" as defined under s. 2 of the IRA. Consequently, the court determined that the issue of unlawful dismissal was irrelevant, as there was no employment, hence no dismissal to begin with. It dismissed the appellants' claim accordingly.

Before The High Court

E **[10]** Woon and Chang then applied for judicial review of their respective Industrial Court awards. The High Court affirmed the awards of the Industrial Court and dismissed the judicial review application. The High Court also adopted the Industrial Court's findings of facts that the contributions of EPF by the company as well as SOCSO and the monthly F deduction of income tax (Potongan Cukai Bulanan, "PCB") to the Inland Revenue Board (LHDN), taken together, do not point conclusively to Woon and Chang been a "workman" of the company and that the company had sufficiently explained that these were agreed benefits given by the company to all its directors.

G **[11]** The High Court was not persuaded that the listing of Woon and Chang in the "register of the employees" of the company would derogate from the fact that they were primarily the directors of the company, together with Lim, as follows in its grounds of judgment ("GOJ"):

H 104. I am of the view that the finding of the Learned Chairman is based on the totality of the evidence adduced before him. To me, the Learned Chairman had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinize every piece of evidence adduced before the Industrial Court and to make another finding of fact. That task of fact-finding falls I within the jurisdiction of the Industrial Court.

(See encl. 11, p. 36)

[12] The High Court Judge rather, seemed to have emphasised that Woon and Chang are not without their remedies as they have already commenced a minority oppression action, and that is consistent with the fact that they are not an "employee" or a "workman" of the company. (See Woon's appeal record, encl. 11 of the High Court's GOJ, paras. 77 to 85).

[13] Against the decision of the High Court in dismissing the judicial review applications, Woon and Chang have now appealed to the Court of Appeal.

Before The Court Of Appeal

[14] Before us, the following issues were raised:

(i) whether the appellants as executive directors of the company, were also engaged as employees of the company and so qualify as a "workman" under the IRA;

(ii) whether the fact of contributions to EPF and SOCSO, and the filing of deduction of monthly income tax on salaries are indicia of a contract of employment not rebutted by the company;

(iii) whether the reliefs claimed in a minority oppression action by the appellants as shareholders of the company preclude their claim for compensation *in lieu* of reinstatement for unlawful dismissal as an employee/ "workman".

Whether The Appellants As Executive Directors Of The Company, Were Also Engaged As Employees Of The Company And So Qualify As A "Workman" Under The IRA 1967

[15] The definition of "workman" in the s. 2 of the IRA reads as follows:

> "workman" means any person, including an apprentice, employed by an employer under a **contract of employment** to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.
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> (emphasis added)

[16] There is nothing incompatible between a person exercising his role as an executive director of the company and at the same time having a contract of employment with the company. The two positions and their respective roles and responsibilities may co-exist. This is especially so in cases where an employee may have started off in a junior capacity and was promoted, through the years, to the highest position as an employee and at the same time assuming the position of an executive director or managing director of the company.

[17] Under company law and in our case the Companies Act 2016, shareholders may requisition for an EGM to remove any director and that is effected by a simple majority of the votes under s. 206(1)(a). There is thus no protection against a director's removal for any reason whatsoever. Controlling shareholders have their right to decide who they want as directors and with that, who they want to remove as directors. This is unlike the procedures for dismissing an employee where a right to be heard is generally accorded for charges of misconduct levelled against him.

[18] It is thus not uncommon for a director to have a contract of employment with the company, whereby their removal as a director would mean they cease to hold that position but continue in their designated role as a high-ranking senior employee. Whilst he may be removable as an executive director by current or new shareholders, his status as an employee would remain intact unless he is dismissed on misconduct.

[19] At the heart of it all, it is a matter of contractual arrangement between the company on the one hand and the directors of the company on the other. There is nothing odd in the present case for the directors/shareholders in Lim, Woon and Chang, to have themselves treated as an employee of the company with terms and conditions agreed among them for these 23 years and at the same time discharging their roles as directors of the company under the then Companies Act 1965 and the current Companies Act 2016.

[20] The fact that there is no written contract of employment does not mean that an oral contract of employment cannot subsist between the company and each of them in this case. After all, s. 2 of the IRA defines the "contract of employment" as follows:

> Any agreement, **whether oral or in writing and whether express or implied**, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.
>
> (emphasis added)

[21] The oral contract of employment was further cemented by the conduct of the company and them. The company, from inception of its business, has listed Lim, Woon and Chang in the "register of employees" of the company in its employment record. Throughout the company's and accounting documents, references were to made to the "salaries" of the directors rather than "fees" of directors where the latter would normally be used for those directors who are non-executive and who are not the employees of the company.

[22] Even in the annual financial reports of the company, (for example, year 2013 and 2016, in Woon's appeal record, encl. 7, pp. 206 and 292), references were made to directors' "salaries" under the heading of "Staff Costs" and "director's fees" and "director's salaries" under the heading of

"Employee Benefits", further buttressing the position that the directors of the company also saw themselves as employees of the company. It is pertinent to note that both Woon and Chang were referred to as technical director and project director, respectively, in the "register of employees" (see Woon's appeal record, encl. 6, p. 22) kept by the company and in various contracts documents with customers and also in the submission of EA Forms and in the forms filed with the Industrial Relations Department for a referral under s. 20 of the IRA for unlawful dismissal.

[23] From the evidence adduced at the Industrial Court, it was established that Woon, as a technical director, had specific roles and duties assigned to him by the company. His responsibilities included onsite monitoring of project works, ensuring that projects were completed within the required specifications and timelines set by customers, and resolving any technical issues that arose during the construction of the projects. It is undisputed that his last drawn salary was RM14,500 per month, in addition to a monthly allowance of RM4,500.

[24] As for Chang, his role as project director in the company included the job scope of discovering new projects, securing potential opportunities, and overseeing the overall operation and management of projects once secured. His last drawn salary was RM18,500 per month plus RM6,000 monthly allowance.

[25] Together with Woon, both of them had secured numerous contracts for the company (see Woon's appeal record, encl. 6, p. 55; Chang's appeal record, encl. 6, p. 41) for examples of the various contracts signed with the customers by Woon and Chang in their capacity as technical director and project director on behalf of the company.

[26] It is pertinent to note that in Lim's case, he was the only one referred as Managing Director (with no other title) in the "register of employees" (see Woon's appeal record, encl. 6, p. 48). Lim explained to the Industrial Court that the use of the designations "technical director" and "project director" were nothing more than a strategy adopted to validate actions by Woon and Chang that they do not have the power to decide but rather that they had to refer the matter to the Board of Directors and so excuse their need to ask for time before reverting to customers.

[27] Whilst that may be true in years gone by, these days, customers can easily do a search of the company they are negotiating with by an online search to know who are the directors and shareholders of the company. However, and like all senior employees of the company, the appellants have specific roles to discharge as technical director and project director of the company.

[28] The appellants submitted that the learned High Court Judge had failed to apply the Court of Appeal's case of *Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection And Testing (M) Sdn Bhd & Anor* [2023] 5 CLJ 917 ("*Gopala*"), which is binding on the High Court. In that case, the court found the appellant to be a "workman" of a company even when he was holding multiple "hats", and despite the absence of a letter of employment. The Court of Appeal observed as follows:

> [2] The issue which featured prominently in the appeal before us was whether the appellant, although a director and shareholder of the company, was also a 'workman' per the definition in s. 2 of the Industrial Relations Act 1967 ('the Act'). In this regard, the Industrial Court precisely framed the question as follows:
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> > [21] The central question that this court needs to determine is whether the claimant who holds the position as a Director and shareholder of the company in his capacity as an Operation Director is also a workman/employee of the company?
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> [8] The appellant joined the company on 3 November 2016. The appellant was appointed to the board of directors of the company and was 'given' 20,000 shares in the company. He did not pay for the shares. It seems that the appellant was brought into the company because of his vast experience in marine cargo surveying and loss adjusting.
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> [12] At any rate, it is not disputed that the appellant was paid a sum of RM20,000 per month which was subject to deduction for statutory contribution to the Employees' Provident Fund ('EPF') and the Social Security Organisation ('SOCSO'). The appellant maintained that although he was a shareholder and director, he was carrying out functions and duties as an employee and paid a monthly 'salary' of RM20,000. The company took the position that the appellant was not a 'workman' as he did not have a contract of employment and was not an employee, and that the monthly payment of RM20,000 was payment of 'director's fees'.
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> [13] The company also contended that nothing hinged on the appellant's EPF and SOCSO contributions and this did not indicate that he was an employee as the other directors also made these contributions but they do not claim to be employees of the company.
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> ...
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> [77] *The fact that he demanded to know his status as a director of the company is not to be equated with him abandoning his status as an employee. The appellant was at all times an employee. There was no explanation by the company worthy of any consideration regarding the description 'Basic Pay' in two of the appellant's director slips (February and March 2017). The judge said that the EPF contribution was made voluntarily. But there was no evidence to establish on a balance of probabilities that the appellant had voluntarily agreed for deductions to be made towards EPF contributions.*

...

[85] It was established in the case of *Henry Eliathamby v. Tootpay Sdn Bhd* [2018] 4ILR 22 (IC), that by merely being a director of a company, does not restrict the director from also being an employee. In *Henry Eliathamby* the Industrial Court held that:

> Based on all the evidence adduced, there had been an implied contract of service, despite the lack of the letter of appointment. Just because he had been a Director of the company, it had not taken away his right to also be its employee and be entitled to his ages and statutory contributions. There is no bar for an employee/ workman to also be appointed as a Director of a company.
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> (emphasis added)

[29] It is to be noted that the Supreme Court case of *Inchcape (M) Holdings Bhd v. RB Gray & Anor* [1985] 2 CLJ 305; [1985] CLJ (Rep) 132 that held in absolute terms that a director cannot be a "workman" under the IRA appeared to have been relegated to the past. Justice Nantha Balan in *Gopala* (*supra*) observed as follows:

> [58] We turn now to the *Inchcape* case. It is acknowledged that **industrial jurisprudence has completely moved away from the Supreme Court's decision in *Inchcape*** which had posited in absolute terms that a director cannot be a workman as defined in s. 2 of the Act. It has now been firmly established by the Federal Court that the mere fact that a person is a company director does not preclude that person from also being a workman for purposes of s. 2 of the Act.
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> [59] The legal position in this regard was clearly stated by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, [1995] 3 MLJ 368 ("*Hoh Kiang Ngan*") and the Court of Appeal decision in *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439, [2004] 3 MLJ 1, [2004] 3 AMR 383 ("*Metatrade*").
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> (emphasis added)

[30] There will be situations where removal of a director would encompass him relinquishing his other roles in a company. In the case of *See Teow Koon v. Kian Joo Can Factory Bhd & Ors* [2016] CLJU 375; [2016] 1 LNS 375; [2016] MLJU 367, the claim was for damages for breach of contract of employment in the civil court and not an Industrial Court claim for unlawful dismissal. The claim arose as a result of the company passing a resolution to reduce the retirement age of directors to 55 years old. This case can be distinguished because it is a claim for damages for breach of contract and not a claim for reinstatement or compensation *in lieu* of reinstatement under the IRA.

[31] Even in the minutes of the EGM that recorded Woon and Chang were removed, it was made clear that the company would no longer pay "salaries" to the appellants, underscoring the fact that the company has always treated

A them as its employees. (See Woon's appeal record, encl. 6, pp. 247 to 248). It was further argued by learned counsel for the company that the payment vouchers further referred to directors' remunerations not "salaries". We are of the opinion that "remunerations" covers "salaries" and "salaries" would be a component of remunerations. *The Concise Oxford Dictionary* (11th edn), B defines "remuneration" to mean "reward, recompense, (now usually) money paid for work or a service; payment, pay."

[32] The company also argued that the appellants have taken on extensive roles in the company's decision-making process since its inception and that the appellants did not need to apply for leave formally, unlike the normal C employees in the company and hence they were "collectively the directing minds and brains of the company".

[33] We are of the considered opinion that, even though both Woon and Chang had carried out their duties as directors of the company under the Companies Act 1965 and the Companies Act 2016, that does not mean that D they cannot at the same time be under a contract of employment under which they also discharged their duties as technical director and project director respectively for the company. Thus, they may wear "two hats" – as a director under the Companies Act and as the most senior and highest-ranking staffs of the company, reporting to the Board of Directors.

E **[34]** The degree of control test is rather archaic where professionals and technical staff are concerned especially when they are very senior and high-ranking in the company like in the capacity of Chief Executive Officer ("CEO") or Chief Operating Officer ("COO"). The more senior and responsible a position one occupies as being part of the senior management F of the company, the less control one would expect from the company in terms of the day-to-day running of the company. In place of control would be targets to achieve, quality assurance to maintain, risk to manage and strategies to adopt with the focus on the overall performance of the company. Control and clocking-in is replaced by mutual accountability and G accountability to the Board of Directors in its overall objective of growing the company.

[35] Even if there is no formal system of applying for leave that is no longer significant for the focus is not on control but on sustaining and growing the business. The executive directors are answerable to the Board of Directors H of the company as a whole and there is nothing incompatible with the fact that these high-ranking employees may also be a member of the Board or even have some shareholding in the company by virtue of their long service reward under some employees' share option scheme or that they may be investors in the company itself.

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[36] Modern-day management gurus are advocating the democratisation of the workplace, empowering of staff and giving autonomy to make decisions in achieving the overall vision and mission of the company. An example of the above approach is that popularised by Ricardo Semler in his book *"Maverick!: The Success Story Behind the World's Most Unusual Workplace"*. A company may thus have flexible working hours with its staff coming to office only a few days in a week. All that the company expects is that when a meeting is called, the staff is there in attendance, either physically or *via* Zoom and questions asked are answered and most importantly, targets set are met. Beyond that, the staff can work from anywhere.

[37] Evidence presented were consistent with the fact that the appellants were both assuming the roles of directors of the company as well as discharging their duties as employees of the company. Indeed, the company's conduct was consistent in treating them as its employees/workmen as evidenced during the commencement of business in the "register of employees" and the annual financial reports of the company.

[38] The documentary evidence of the company consistently refer to both Woon and Chang as an employee of the company. The fact that they are also directors of the company does not disqualify them from being an employee and hence a "workman" within the meaning of the IRA. Their removal as a director, does not in the circumstances of this case, amount to their dismissal as an employee of the company. The appellants as a "workman" is entitled to seek the remedy of reinstatement or compensation *in lieu* of reinstatement as the Industrial Court has jurisdiction to hear the dispute.

Whether The Fact Of Contributions To EPF And SOCSO, And The Filing Of Deduction Of Monthly Income Tax On Salaries Are Indicia Of Contract Of Employment Not Rebutted By The Company

[39] The definition of "employee" and "self-employed" under s. 2 of the Employees Provident Fund Act ("EPF Act") is as follows:

> "employee" means any person, not being a person of the descriptions specified in the First Schedule, who is employed under a contract of service or apprenticeship, **whether written or oral and whether expressed or implied**, to work for an employer;
>
> "self-employed" person means any person who is gainfully occupied and is not an employee;
>
> (emphasis added)

[40] An employer who has engaged an employee as so defined shall be statutorily required to prepare and furnish a statement of wages to each and every employee for its monthly contribution as well as the employee's monthly contribution to the EPF under s. 42 and s. 43 of the EPF Act.

[41] For self-employed and business owners, they may contribute towards their own retirement funds under the EPF Act by virtue of the regulation which has a cap of maximum RM5,000 per month at the material time. This is an exception rather than the rule. The EPF statements of both Woon and Chang (see Woon's appeal record, encl. 6, p. 11) show that the contributions were based on a percentage of the salaries for the employer (the company) and a percentage of the salaries for the employee. Both the employer and the employee contributed their respective portions to the EPF. It is clear that this arrangement is only applicable in an employer-employee relationship.

[42] More than just contributing to EPF, there was also contribution to the Social Security Protection Scheme ("SOCSO") under the Employees' Social Security Act 1969 ("SOCSO Act"). The SOCSO Act provides insurance coverage for insured "employees" as defined under s. 2 as follows:

> "employee" means any person who is employed for wages under a **contract of service** or apprenticeship with an employer, whether the contract is **expressed or implied or is oral or in writing**, on or in connection with the work of an industry to which this Act applies and:
>
> (i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the industry, whether such work is done by the employee on the premises of the industry or elsewhere; or
>
> (ii) who is employed by or through an immediate employer on the premises of the industry or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the industry or which is preliminary to the work carried on in or incidental to the purpose of the industry; or
>
> (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;
>
> (emphasis added)

[43] Again, the company tried to justify that the contribution for Woon and Chang (see Woon's appeal record, encl. 7, p. 8) is a benefit given to its directors but the form prescribed for SOCSO contribution declares the company to be the employer of the appellants whose contributions are included. Surely, if the company wants to provide better benefit for its directors, it could have explored other private insurance policies, as usually the claims under SOCSO are much less than usual private insurance policy that is paid by way of premium.

[44] We hear the company's arguments that these EPF and SOCSO contributions are benefits for the directors when they are in fact not employees of the company. Justifying such an approach runs counter to the scheme of the EPF Act, which differentiate business owners/self-employed

on one hand, and employees on the other. The SOCSO coverage is only for insured employees who are engaged under a contract of service with the company. The company cannot represent to the statutory authority that Woon and Chang are its employees and then deny the same for the purpose of the IRA.

[45] Moreover, there is a monthly deduction of income tax (PCB). It can be seen in the EA Forms submitted to the LHDN, which includes the appellants (see Woon's appeal record, encl. 7, pp. 18 to 23). Such would not be a case for directors who are not under a contract of employment with the company for they will be earning directors' fees for their service as non-executive directors. In that case, it would not be submission through the EA Form under the category of "SG".

[46] The EA Form is an annual statement issued by employers to their employees and it summarises the employee's total income, allowances, deductions, and benefits-in-kind for the entire year. The employees would use it to file their income tax return with the LHDN. It includes information on the monthly tax deductions (*eg*, PCB) made during the year. Employees would be able to cross-check the total PCB deductions in the EA Form with their monthly payslips or LHDN records.

[47] The "SG" in the EA Form is indicative of income flows from salaries as an employee under the Income Tax Act 1967 and it also includes wages, bonuses, and allowances other cash incentives. In brief, SG means individual, non-business source of income. This is as opposed to OG which covers income from business sources.

[48] The fact that there is no written contract of service or employment does not make the employment any less a contract of employment for the definition of a "contract of employment" in s. 2 of the IRA. In the case of *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439; [2004] 3 MLJ 1, the Court of Appeal held that:

> 28. The appellant claimed that the respondent had to contribute the equivalent of 13% of his basic salary towards the Employment Provident Fund. This claim was not disputed. Section 2 of the Employees Provident Fund Act 1991 ('EPF Act') provides 'wages' means, *inter alia*, all remuneration in money due to an employee under his contract of service and includes any bonus. Section 43(1) of the EPF Act provides every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages for the month. *We cannot find any reason why the respondent would take it upon its good self to make contributions towards the said fund on the appellant's wages if the appellant was not its employee.*

> 29. The relationship of employer and employee exists where a worker is employed under a contract of employment, ie a contract of service. According to *The Concise Oxford Dictionary* (9th Ed), an 'employee' is 'a person employed for wages or salary'. A person who is appointed director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as director would depend on the articles of association and that would normally have to be determined by the company in general meeting. *An employee of a company can of course be appointed director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary. As director, he would further be entitled to any remuneration as determined by the company in general meeting if that is what is provided for and allowed by the articles of association of that company*.
>
> (emphasis added)

[49] We agree that a person who is appointed a director of a company may not be an employee of the company and this is especially the case where the director is a non-executive director and more so in a public-listed company where the Bursa Listing Requirements require 1/3 of the Board members to be independent non-executive directors and the Corporate Governance prescribing at least 50% of the Board members be independent. They are basically non-working directors of a company and as for public-listed companies, they would meet at least four times a year to deliberate on the quarterly results of the company before its announcement *via* the Bursa-link and also on other matters affecting the performance and strategic growth of the company. (See the Malaysian Code of Corporate Governance and the Bursa Listing Requirements). The remuneration paid to these non-executive directors are by way of a director's fees normally approved at the AGM of the company by its shareholders.

[50] Likewise, an employee and usually a very senior employee by whatever job designation he may be called – CEO, COO, Group General Manager or Country Manager, whether groomed from within or headhunted from outside, who is made a director of the company may not have his position as a most senior employee of the company terminated nor need he relinquish that post upon being made a director of the company. These are working directors of a company who may be its executive or managing director and they may well have a contract of service with the company, whether oral or written, with respect to their salaries, allowances and emoluments and other benefits.

[51] We cannot ignore these three statutory documents, which are strong indicia confirming the appellants were employed by the company under a contract of employment as an employee and such a fact has not been rebutted by the company on its flimsy excuse of conferring additional benefits to its directors. The fact that Woon and Chang are also directors of the company

is not, in the circumstances of this case, in conflict with their roles as employees of the company. They are no less an employee of the company and thus qualify as "workman" under the IRA while at the same time discharging their statutory duties as directors who are answerable to the Board.

Whether The Reliefs Claimed In A Minority Oppression Action By The Appellants As Shareholders Of The Company Preclude Their Claim For Compensation *In Lieu* Of Reinstatement For Unlawful Dismissal As Employee/"Workman"

[52] The learned High Court Judge appeared to have been swayed by the arguments that since the appellants have commenced a shareholders' minority oppression action against Lim and the company, they should not be allowed to pursue a case for compensation *in lieu* of reinstatement in the Industrial Court.

[53] About six days after their removal as directors of the company, they issued a legal notice to Lim and his son, Jovi, to demand a buyout of their shares and taking the stand that they had been oppressed as minority shareholders. That is a common remedy sought by minority shareholders who are aggrieved by the company removing them as directors. Being a private limited company, their shares first have to be offered to the existing shareholders and cannot be disposed of in the open market, unlike shares in a public-listed company. That remedy is available to them as minority shareholders who often would have no other choice other than to recover their investments in the company through a share sale to the majority after a valuation is done. That is separate and distinct from pursuing their grievance as an employee that had been dismissed without just cause and excuse by the company.

[54] Perhaps the learned High Court Judge, had forgotten to address the fact that the primary basis of bringing a minority oppression action is premised on one's capacity as a minority shareholder and whether one is also a director, is only incidental to the shareholders' action. There is no correlation between the minority action from a shareholder and the relief on compensation *in lieu* of reinstatement that a dismissed employee may pursue an unlawful dismissal claim under the IRA. The claim under the IRA arises by virtue of a contract of employment – whether oral or written, or partly oral or partly written, or even by conduct of the parties.

[55] As the IRA is a piece of social legislation that grants protection to an employee, there is no good reason why an employee should not be able to claim the necessary relief and remedy under the Act.

[56] Pursuing remedy under minority oppression action as a shareholder should not prejudice their claim for unlawful dismissal under a contract of employment with the company in the Industrial Court. Any minority shareholder who is aggrieved by the action of the majority would have the *locus* to pursue the remedies available for oppression of a minority shareholder's rights irrespective of whether that shareholder is an employee of the company.

[57] An error of law in the award of an Industrial Court would be susceptible to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 at p. 101 (CLJ); p. 46 (MLJ) as follows:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, *etc*' kind, **judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts**. In the words of Lord Denning in *Pearlman v. Harrow Schoo*l (*ibid*) at p 70,*... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it.
>
> (emphasis added)

[58] Generally, the court would not disturb the findings made by specialised tribunals, such as the Industrial Court, except on the grounds of illegality, irrationality, procedural impropriety or proportionality. In *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1, at p. 639 (CLJ) p. 11 (MLJ), the Federal Court emphasised that findings of fact by the Industrial Court can be subject to judicial review and where the conclusions reached are unsupported by evidence, or where the tribunal has taken irrelevant matters into account or failed to consider relevant matters.

> It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.

[59] The Industrial Court dismissed the initial claim on the basis that the appellants did not fall under the definition of 'workman' as provided in s. 2 of the IRA. However, upon review of the evidence presented, which material facts are not seriously disputed, the court finds that the appellants

have sufficiently demonstrated that they qualify as 'workman' within the statutory definition. In doing so, we are not disturbing the findings of facts, but are arriving at a different conclusion or inference based on the same facts.

[60] Consequently, we are satisfied that the Industrial Court had made an error of law justifying the award to be quashed as the Industrial Court had jurisdiction to hear the dispute and to grant the compensation sought *in lieu* of reinstatement. There was no show cause letter nor any domestic inquiry held nor any evidence adduced at the Industrial Court to justify their dismissal.

[61] The removal of the appellants as directors of the company does not, in the circumstances of this case, automatically result in a dismissal of them as employees of the company. In fact, the roles of shareholders, directors, and employees in a company are separate and distinct, each governed by its own legal framework of duties and responsibilities.

[62] The fact that these roles coalesce in a person does not warrant a conflation of what must remain conceptually and functionally distinct and separate, within a corporate structure where the person may be one and at the same time a director, shareholder and employee of the company. This principle is traceable back to the landmark case of *Salomon v. A Salomon & Co Ltd* [1897] AC 22, which established that a company is a separate legal entity, distinct from its directors, shareholders, employees and agents. Consequently, the dismissal or cessation of one role, such as an individual's directorship, does not automatically affect or extinguish the rights and responsibilities attached to his other roles, such as that of a shareholder or employee. Maintaining this distinction ensures that the corporate veil remains intact, preserving the integrity of the company as an independent legal person. The roles of the appellants as employees have not been subsumed into or superseded by their roles as directors of the company and they remain separate and distinct in their capacity as employees of the company.

[63] Essentially, there is nothing strange or extraordinary for a director of a company to be also an employee of the company; much depends on whether he is expected to play an executive role in the company as a working director answerable to the Board of Directors of the company or as a non-executive director where his duty is of an intermittent character where quarterly or more regular meetings of the Board of Directors are concerned with attendance also at AGM and EGMs of the company.

[64] In general, there is little in terms of security of tenure as a managing or executive director of a company as shareholders may boot such a director out at any time and especially when there are new shareholders who have

taken a controlling stake in the company or when there is a board tussle. Little wonder that managing and executive directors of a company may want to be employees of the company too so that their removal as a director by a mere majority of the votes at an EGM does not automatically mean that they have been dismissed as an employee of the company. For that dismissal, it must be for a just cause and excuse, which is understood to mean that it must be because of a misconduct that justifies a dismissal.

Decision

[65] The company had pleaded in such a way that it stood or fell based on the defence that the appellants were not a "workman" within the meaning of the IRA and had not adduced evidence in the Industrial Court with respect to misconduct on the part of the appellants.

[66] This court is of the view that this was not a fit and proper case to be remitted back to the Industrial Court for a rehearing. The company, in its statement of reply (see Woon's appeal record, encl. 6, p. 292), pleaded that Woon and Chang had breached their fiduciary duties, yet no evidence was led to substantiate this allegation. To remit the matter back to the Industrial Court would unfairly afford the company a second bite at the cherry, particularly when it had chosen to defend the claim on the basis that the Industrial Court lacked jurisdiction by asserting that Woon and Chang were not 'workmen'.

[67] Having found that the appellants, Woon and Chang, qualify as 'workmen' and that the Industrial Court has jurisdiction, and further that no evidence was adduced to prove their alleged misconduct, it follows that their dismissal was without just cause or excuse. This court can proceed to award damages or compensation *in lieu* of reinstatement, consistent with the reliefs commonly sought before the Industrial Court. If authority is needed, one may refer to the majority decision of Edgar Joseph Jr FCJ in the Federal Court's case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, at p. 218 (CLJ); p. 227 (MLJ):

> Thus, it was my view, that in appropriate circumstances, our High Courts have the power not merely to quash an Award of the Industrial Court but to go on to make a finding that an employee has been dismissed from service without just cause or excuse, and when necessary, to award fair compensation. Consequently, on appeal from the judgment of the High Court to this court, we too, as an Apex Court, with full appellate powers, must have the same power.
>
> In any event, reflection reveals that on a further ground also we were empowered not merely to quash the Award of the Industrial Court but also to make a finding that the Employee had been dismissed from service without just cause or excuse, and to go on to make the consequential orders for fair compensation.
>
> ...

Later at p. 222 (CLJ); p. 231 (MLJ):

> As I had said in my supporting judgment, it appeared that all the material evidence for the purpose of assessing the monetary compensation payable was before us, and indeed, there was no suggestion to the contrary by learned counsel for the Employer, Dr Das. Had there been such a suggestion, then no doubt, we would have had to consider whether or not to remit the matter to the Industrial Court with a direction to assess the compensation payable. But, in the event, *all that appeared to be required was a simple arithmetical calculation and this was why I concluded: 'In the very special circumstances of the case, to remit the case to the Industrial Court to assess the monetary compensation payable by the Employer to the Employee would seem to be a certain detachment from reality and, more importantly, it will not answer the needs of justice*.
>
> (emphasis added)

...

At p. 223 (CLJ); p. 232 (MLJ):

> With respect, this criticism overlooks the point that before us, on the question of consequential reliefs, counsel for the Employee had confined his contention to compensation. Therefore, no other order except that of compensation would have been appropriate and so reinstatement ceased to be an issue.

[68] In any event, O. 53 r. 5 of the Rules of Court 2012 allows the court upon hearing a judicial review application to award damages in a case properly pleaded and where it is justified.

[69] For the reasons given above, this court allowed the two appeals and quashed the dismissal of the claims by the Industrial Court. We set aside the order of the High Court and made an order for compensation *in lieu* of reinstatement based on the Practice Note No. 3 of 2019 of the Industrial Court. This practice note specifies that the compensation is calculated at the rate of one month's salary for each year of completed service.

[70] We made the following order:

(i) for Woon: we ordered compensation *in lieu* of reinstatement based on last drawn salary of RM14,500 per month plus RM4,500 monthly allowance x 23 months (derived from 23 years of service) = RM437,000;

(ii) for Chang: we ordered compensation *in lieu* of reinstatement of RM18,500 per month plus RM6,000 monthly allowance x 23 months (derived from 23 years of service) = RM563,500.

A **[71]** As for both appellants, this court ordered backwages of a maximum of 24 months x their respective last drawn salary and allowance based on their evidence before the Industrial Court.

(i) for Woon: we ordered backwages RM14,500 per month plus RM4,500 monthly allowance x 24 months = RM456,000;

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(ii) for Chang: we ordered backwages RM18,500 per month plus RM6,000 monthly allowance x 24 months = RM588,000.

[72] Pursuant to the Industrial Relations (Amendment) Act 2020, any monetary sum awarded by the Industrial Court may carry interest up to eight

C percent (8%) per annum to run from the 31st day of the making of the award (9 August 2022) until its satisfaction, and we so ordered.

[73] We also ordered costs of RM20,000 for each appellant here and below subject to allocatur.

D **[74]** The sums are to be paid to Messrs Gavin Jayapal, solicitors for the appellants.

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